

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-v-

Case Number: 13-20369

JOHN ROBERT DAVIS,  
RUFUS DEON WILSON,

Defendants.

\_\_\_\_\_ /

MOTION TO PRECLUDE ENTRAPMENT DEFENSE  
BEFORE THE HONORABLE BERNARD A. FRIEDMAN  
UNITED STATES DISTRICT JUDGE  
100 U. S. Courthouse & Federal Building  
231 West Lafayette Boulevard West  
Detroit, Michigan 48226  
THURSDAY, May 15th, 2014

APPEARANCES:

For the Plaintiff:

MICHAEL C. MARTIN,  
ASSISTANT U.S. ATTORNEY

DOUGLAS SALZENSTEIN,  
ASSISTANT U.S. ATTORNEY

For the Defendant Davis:

Ronald E. Kaplovitz, Esq.

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JOAN L. MORGAN, OFFICIAL COURT REPORTER  
734 812-2672

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1 Detroit, Michigan

2 Thursday, May 15<sup>th</sup>, 2014

3 -- -- --

4 THE COURT: This is the matter of the United  
5 States of America versus Davis, Wilson.

6 Mr. Boles was severed this morning.

7 May we have appearances for the record, please.

8 MR. MARTIN: Michael Martin and Douglas  
9 Salzenstein for the Government, your Honor.

10 MR. KAPLOVITZ: Your Honor, Ron Kaplovitz, on  
11 behalf of Mr. Davis.

12 I am also standing in for Mr. Daly. I've  
13 understood from what I've seen on the notification that Mr.  
14 Wilson is not going to be attending as he's in Midland.  
15 They were not able to bring him in.

16 THE COURT: So he's not here?

17 MR. KAPLOVITZ: He's not here.

18 THE COURT: Okay.

19 MR. KAPLOVITZ: This is what I was told, your  
20 Honor.

21 THE COURT: That's fine.

22 MR. MARTIN: Your Honor, with respect to Mr.  
23 Wilson's absence what I would suggest at the outset is that  
24 perhaps the Court address the Government's motion with  
25 respect to Mr. Davis, and depending on how your ruling

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1 comes out, perhaps reserve judgment with respect to Mr.  
2 Wilson, and give him an opportunity to be heard because if  
3 the Government were successful in this, you know, we're  
4 asking for you to preclude a defense. Thinking forward if  
5 there were a conviction in this case, I would be concerned  
6 that perhaps his lack of presence here and his attorney  
7 could be an issue.

8 THE COURT: His attorney called and indicated that  
9 counsel could -- I'll tell you right now and let's just  
10 talk about it, I think that they have a right to raise it.  
11 And I think they have a right to raise it. And I think the  
12 law in the Sixth Circuit, and please correct me if I'm  
13 wrong, doesn't mean just because they raise it that I'm  
14 going to charge the jury on it, but I have to make a  
15 determination at the conclusion of the trial whether or not  
16 there's sufficient evidence as to the -- at least  
17 essentially two factors exists. So I think they have a  
18 right under the Sixth Circuit law the way I see it to raise  
19 it. Now, whether or not they have the right to have the  
20 matter go to the jury is another question. I mean that's  
21 how I see it, and I would be more than happy to hear any  
22 argument.

23 From a defense standpoint, and this is a  
24 question, and then maybe each of you can answer it for me,  
25 and that is that -- I think they have a right to raise it.

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1 Does that then -- if they don't testify -- does that then  
2 -- I'm not suggesting I need an answer today, but that's an  
3 answer we're going to have to contend with by looking at  
4 your pleadings. Does that mean that they can -- "they"  
5 being the Government can then introduce evidence concerning  
6 their criminal record for purposes of showing propensity?  
7 So those are my issues.

8 Number one, I think the Government, I would be  
9 more than happy to listen to any argument. I think, number  
10 one, is I think they have a right to raise it. They have a  
11 right to argue it. Whether it goes to the jury depends on  
12 whether or not I believe there's sufficient -- do you  
13 disagree with that, counsel? That's a fair analysis?

14 MR. KAPLOVITZ: Your Honor, I don't disagree with  
15 that at all. I think you're absolutely right about some  
16 facts. Basically -- it's almost like a reversed directed  
17 verdict motion by the Government.

18 THE COURT: Let me hear what the Government -- I  
19 agree with you. I've had a chance to look -- I haven't had  
20 one of these in so long, I had to go back and look at it,  
21 and I've looked at the Sixth Circuit jury instructions, and  
22 comments and so forth. What's the Government's --

23 MR. MARTIN: Yes, your Honor.

24 So my basic position is I think in the typical  
25 case, you're right, the defendant does have the right to

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1 raise the entrapment defense. And typically the way it  
2 proceeds is they raise it during the course of the trial  
3 and then the judge looks at the evidence that came in  
4 during the course of trial, and makes a determination on  
5 should an instruction be given or not.

6 In fact, I had a -- I don't know if you recall  
7 this case or not. It was United States versus Poole. I  
8 think it was maybe three years ago now I had a trial in  
9 front of your Honor with --

10 THE COURT: Now that you say Poole, I remember  
11 that.

12 MR. MARTIN: Yeah, he raised the entrapment  
13 defense and that's exactly how it proceeded in that case.

14 This is different because what's happening in  
15 this case is that the type of inducement that the  
16 defendants are alleging as the basis for their entrapment  
17 defense is not an inducement that is sufficient under the  
18 law. Whereas -- let me contrast it to the Poole case.

19 In the Poole case --

20 THE COURT: But if it isn't sufficient then they  
21 raise it and they don't get an instruction. How can I make  
22 that determination before I hear the testimony. I don't  
23 know -- the only testimony that I know -- the only thing  
24 I've read is what the Government has presented.

25 MR. MARTIN: Because they told you in their

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1 responses to our motion what their alleged inducement is.

2 I'm just reading from Mr. Daly's brief, quote,

3 "The promise of a large amount of drugs, 10  
4 kilograms of cocaine, was the lie used to induce the  
5 defendants to participate."

6 That claim that just, hey, this was a crime  
7 involving a lot of drugs, or this was a crime involving a  
8 lot of profit is not at a matter of law sufficient for  
9 inducement.

10 If you would just indulge me, your Honor --

11 THE COURT: Sure.

12 MR. MARTIN: Since we've filed our brief, we've  
13 had a chance to go back and look at other cases from other  
14 circuits as well, and I would just like to show you through  
15 these cases as well that I'm not out on left field on this.  
16 This is established law not only in the Sixth Circuit, the  
17 cases I've cited, but also in other circuits.

18 This is a case, United States versus Cortex. It's  
19 from the Ninth Circuit, from 2013. It's at 732 F.3d 1078.  
20 This is a quote,

21 "It is not entrapment if a person is tempted into  
22 committing the crime solely on the hope of obtaining ill-  
23 gotten gain. That is often the motive to commit a crime."

24 Here's another one from Ninth Circuit, United  
25 States versus Stenberg, 803 F.2d 422. This is a 1986

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1 decision.

2 This is a defendant by the name of Fike,  
3 "Fike's principal argument is that he was in dire  
4 financial straits and was induced to commit the charged  
5 offense by the large sums of money Gavitt was offering."

6 That was the undercover agent.

7 "We have made clear that harsh though the rule  
8 may be an individual cannot claim he was entrapped simply  
9 because he was poor and could not resist the substantial  
10 sums of money to be made."

11 Here's a case from the First Circuit, United  
12 States versus Diaz-Diaz, 433 F.3d 128. This was decided in  
13 2005, quote,

14 "The promise of financial gain, however, even if  
15 significant is insufficient to demonstrate government  
16 inducement."

17 And then lastly there was a case from the Seven  
18 Circuit. This is United States versus Hall. It's 2010  
19 decision. It's at 608 F.3d 340. I want to highlight this  
20 case because it was a drug house robbery sting by the AFT.  
21 The exact case we have in this --

22 THE COURT: Give me the cite, please.

23 MR. MARTIN: Yes, sir. It's 608 F.3d 340, United  
24 States --

25 THE COURT: Can you get that for me?

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1 Do you have a copy of it?

2 MR. MARTIN: I think I do, your Honor.

3 THE COURT: Oh, that would be great.

4 MR. MARTIN: I have an extra one for Mr.

5 Kaplovitz.

6 THE COURT: Thank you.

7 MR. MARTIN: If your Honor would just give me a  
8 second I'm going to note the page I'm going to read from so  
9 you can follow along with me.

10 May I approach, your Honor?

11 THE COURT: Of course.

12 MR. MARTIN: I've highlighted the portions that  
13 I'm going to quote from.

14 THE COURT: Great.

15 MR. MARTIN: If I may just read them into the  
16 record.

17 THE COURT: Why don't you just wait one second,  
18 let me look at the case, please.

19 What page?

20 MR. MARTIN: This page 344 of the text. It's page  
21 5 up in the corner.

22 THE COURT: Okay. Go on.

23 MR. MARTIN: Your Honor, if you turn to page 4 at  
24 the top, the first full paragraph on the left starts,  
25 quote,



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1            "One key issue was whether Hall could present an  
2            entrapment defense. Before trial the government filed a  
3            motion in limine to preclude the presentation of any  
4            evidence or argument regarding entrapment. The district  
5            court granted the motion, but Hall, nevertheless, requested  
6            that the jury be instructed regarding entrapment. The court  
7            denied that request."

8            So that is the same procedure we're attempting to  
9            follow here.

10           And then if you turn to the next page, page 4,  
11           down towards the bottom, that defendant, Mr. Hall,  
12           basically raised the same type argument that these  
13           defendants are with respect to inducement. The Seventh  
14           Circuit said, quote,

15           "We also disagree with Hall's contention that the  
16           sizeable potential profit from the proposed robbery of  
17           cocaine was an extraordinary inducement. We rejected a  
18           similar argument in Millet which also involved a planned  
19           heist of illegal drugs."

20           And then in the next column over it picks back up  
21           with, quote,

22           "In other words Hall was presented with the same  
23           temptation faced by any person contemplating the robbery of  
24           a drug stash house. The chance to acquire quickly a large  
25           amount of drugs that could be sold for a big profit."

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1           In other words this idea that the profit from the  
2           underlying crime cannot as a matter of law be an  
3           inducement. Inducement is something else under the law, and  
4           I've explained that in those Sixth Circuit decisions I've  
5           cited. Inducement is something like a threat by the  
6           undercover agent. You do this crime, or you're going to get  
7           it. Or you've got to do this crime to save your child, your  
8           dying child. Something besides just the gain you get from  
9           the crime.

10           And so the defendants in this case when I filed  
11           my motion in limine challenging whether they could make out  
12           the element of inducement have now come back to the Court  
13           in their filings and said, no, the inducement that we are  
14           going to allege in this case was the profit from the crime.

15           My point is that, that's insufficient as a matter  
16           of law and, therefore, you should say at the outset look  
17           defendants if that's the inducement you're going to claim  
18           you don't get to raise entrapment. If you have some other  
19           inducement you want to claim let's hear what it is and  
20           maybe you can present the defense. But just saying, hey,  
21           there was a lot of money at stake I could have made a lot  
22           of money is not sufficient as a matter of law.

23           And here how it plays out as a practical matter  
24           from my prospective. The defendants come in and raise the  
25           entrapment defense. They stand up in Opening and say my

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1 client was entrapped. They cross-examine the Government's  
2 witnesses about entrapment. They constantly are talking  
3 about entrapment during the course of the Government's case  
4 in chief. Then they decide we think we've established that  
5 there was a large amount of money at play here. We think  
6 that is sufficient to show entrapment, your Honor. We're  
7 not going to put on a defense, we're not going to testify,  
8 we've established inducement right there by cross-examining  
9 the Government's agents about how many kilos of cocaine  
10 were in the house, and we rest. And the jury has heard this  
11 whole case from the parties and the defense about  
12 entrapment, and now the Court's not going to instruct them  
13 on what that is? It's not talked about it? It seems  
14 unpractical.

15 The risk is that the jury gets back in the jury  
16 room and just kind of makes up their own --

17 THE COURT: How about the Government make a motion  
18 for me to charge the jury, ladies and gentlemen of the  
19 jury, profit is not an element of entrapment and I'm not  
20 going to charge you on entrapment.

21 MR. MARTIN: Well, if you were to deny our motion  
22 today I would ask for such an instruction.

23 THE COURT: I mean, I don't know what I'm going to  
24 do.

25 Let me hear what the other side has to say first.

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1 MR. KAPLOVITZ: Your Honor, the Government's  
2 statement of the law is correct except for the fact that --  
3 that's correct.

4 THE COURT: I think he's right.

5 MR. KAPLOVITZ: And you know what, that's what the  
6 law there needs to be something else, and there is in this  
7 case with regards to my client.

8 THE COURT: Tell me what it is.

9 MR. KAPLOVITZ: My client and Labron Nunn, the  
10 confidential informant, they lived in the same household  
11 together. Their parents had a dating relationship. It's a  
12 friend/family based relationship. That's something else.  
13 And it's specifically cited.

14 Your Honor, your ruling, your intended ruling is  
15 absolutely correct. This is an issue that has to be sorted  
16 out at the end of every case.

17 THE COURT: It's easy. I think I have to allow you  
18 to proceed. However, with the understanding that you agree  
19 and I agree that profit isn't entrapment.

20 MR. KAPLOVITZ: But I have something else. I do  
21 have something else. It's legitimate --

22 THE COURT: That's fine. It has to be legitimate.  
23 If the defense both for yourself and the other defendant,  
24 if they have something that's legitimate you may go forward  
25 with it.

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1 I agree with the Government, profit isn't one of  
2 those.

3 MR. KAPLOVITZ: And I will indicate that I intend  
4 to call some witnesses to verify the relationship between  
5 Mr. Nunn --

6 THE COURT: I'm not even sure relationship -- I'll  
7 have to listen to the testimony.

8 MR. KAPLOVITZ: I understand.

9 THE COURT: But as long -- if there is some  
10 reasonable degree of law as to what your theory is on  
11 entrapment, yours or the other defendant, that's great. If  
12 it turns out that you just raise it as a red herring then I  
13 suspect -- number one, I'm not going to give the jury a  
14 charge on entrapment if there's no evidence for which they  
15 could base their decision. And if there is introduction of  
16 evidence that is clearly not entrapment and there's a whole  
17 bunch of things that aren't.

18 If you just read the Sixth Circuit jury  
19 instructions comments they talk about all the things that  
20 aren't as well as lots of other cases. Then I may be forced  
21 to give -- if the Government request it a charge by the  
22 Government. But what I'm thinking is we have good attorneys  
23 on both sides. I think the law is pretty clear that if  
24 there is some degree of reasonableness that the defendant  
25 want it -- raise that as a defense and we've got good

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1 lawyers, lawyers who have done the research, profit I think  
2 we all agree is not one of those.

3 I don't want to stifle the defense in terms of  
4 entrapment if they think they have a case. If they have a  
5 case, fine. If they don't, that's fine, too. It's a double-  
6 edge sword because once that defense is raised then -- and,  
7 again, I don't want to go into it.

8 It's funny, I haven't had this -- I forgot about  
9 the Poole case. It's been such a long time I've decided --  
10 sometime when you do just a little research it's better to  
11 do the whole research than just a little. A million  
12 questions came up in my mind for both sides.

13 MR. MARTIN: Well, I did want to also address the  
14 second question that you posed at the beginning of the  
15 hearing which was, you know, if they do raise the defense  
16 can the Government rebut it in its case in chief, and how  
17 is that going to work?

18 THE COURT: Well, I think you have to wait to see  
19 what they're going to do because if they testify then you  
20 can go into their criminal records. If they don't testify  
21 then I think -- again, sometimes a little research is worse  
22 than no research. The way I've been looking at the law so  
23 far I haven't found any law anything other than saying that  
24 the Government has a right to introduce criminal records  
25 with a limited instruction as what the purpose --

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1 MR. MARTIN: My concern though is that, you know,  
2 I think Mr. Kaplovitz will probably -- I don't know  
3 probably -- he may very well be able to establish this  
4 familia relationship that he's seeking to do through cross-  
5 examination of some of the Government's witnesses it calls  
6 in its case in chief and I could very well see a situation  
7 where at the end of the day he feels like he had the  
8 entrapment defense, wishes to argue it, and doesn't put on  
9 a case in which case it's too late. The Government will  
10 have rested and won't have a chance to rebut with things  
11 like criminal record. That's why I moved as an alternative  
12 if you were not inclined to prevent them from raising the  
13 defense say to the defense now look you have now noticed as  
14 I required you to do it is your intention to proceed with  
15 entrapment. Your defense is entrapment. That way the  
16 Government can in its case in chief just go ahead and do  
17 the rebuttal because I imagine Mr. Kaplovitz through his  
18 cross-examination questions is going to be trying to  
19 establish that defense.

20 THE COURT: In fairness to both sides --

21 MR. KAPLOVITZ: Your Honor -- I'm sorry.

22 THE COURT: Go on. No, no, I want to hear.

23 MR. KAPLOVITZ: They filed 404(b) notices which  
24 probably have the same convictions they want to utilize.  
25 They'd be able to do that in their case in chief anyway. I

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1 hate to admit it and it's sad to see but they're going to  
2 get in significant parts of his record -- we're going to  
3 get some of this stuff under 404(b).

4 THE COURT: You're going to listen to their  
5 Opening Argument. They're going to listen to yours so  
6 you'll know what it is and you'll know -- if they raise it,  
7 I'd be more than happy to allow you to go into it if it's  
8 raised in the Opening Arguments.

9 To resolve the question and I think you're right,  
10 as to -- so you don't get sandbagged at the end, what we'll  
11 do is -- and remind me so I don't forget -- when the  
12 Government is getting ready to rest we have a conference  
13 between the attorneys on the record just outside the  
14 presence of the jury, how the defense is going to proceed  
15 so that before you rest they'll give you some -- they'll  
16 tell you what they're going to do. If they're going to call  
17 witnesses they'll tell you who the witnesses are. If  
18 they're not going to call witnesses then you won't get  
19 sandbagged. You'll have time to call witnesses or put on  
20 evidence or --

21 MR. MARTIN: Thank you, your Honor.

22 THE COURT: However -- again, one very important  
23 caveat, if it is raised, anything that is raised whether  
24 it's the relationships or anything during the Opening  
25 Statement you may -- the door is opened.



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1 MR. MARTIN: Okay.

2 THE COURT: Once it's opened, it says opened and  
3 the Government can proceed from there.

4 And remind me just before you're ready to rest,  
5 we'll talk about this.

6 MR. MARTIN: Thank you, your Honor. I appreciate  
7 your --

8 THE COURT: And you'll let counsel what happened?

9 MR. KAPLOVITZ: Yes. I'll will explain it.

10 THE COURT: And let the record reflect that he did  
11 call and he said counsel could stand in. If there's any  
12 questions between now and the trial about this issue let me  
13 know and we'll resolve it.

14 MR. MARTIN: On another procedural matter --

15 THE COURT: Please.

16 MR. MARTIN: -- entirely separate --

17 THE COURT: Yes.

18 MR. MARTIN: Both Mr. Wilson and Mr. Davis have  
19 not yet been arraigned on the Second Superseding  
20 Indictment. I don't know if Mr. Kaplovitz is available to  
21 do that with respect to Mr. Davis today. I've prepared an  
22 acknowledgment if he wishes to --

23 MR. KAPLOVITZ: I'll do it now.

24 THE COURT: I'll do it right now.

25 MR. MARTIN: Okay.

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1 THE COURT: Counsel, have you seen this Second --

2 MR. KAPLOVITZ: I've seen the Second Superseding  
3 Indictment, and I've given a copy to my client.

4 THE COURT: He pleads not guilty.

5 MR. KAPLOVITZ: Not guilty, your Honor.

6 THE COURT: The Court will enter a plea of not  
7 guilty.

8 MR. MARTIN: Your Honor, if I could just have --

9 THE COURT: Have it acknowledged, yes.

10 MR. MARTIN: Receive this acknowledgment and sign  
11 it and give it to the Court?

12 THE COURT: Yes. As to Mr. Wilson --

13 MR. MARTIN: I will contact Mr. Daly and either  
14 arrange for a time in duty court or next time we're in  
15 court here.

16 THE COURT: Get that signed.

17 MR. MARTIN: Okay.

18 THE COURT: Do you know where he's being held?

19 MR. MARTIN: I think he's in Midland which is the  
20 problem.

21 THE COURT: If we have to we'll arraign him before  
22 we pick the jury.

23 MR. MARTIN: Yes, sir.

24 THE COURT: Have him see what he can do about  
25 getting that signed.

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1 MR. MARTIN: I will.

2 THE COURT: Rather than having the marshals move  
3 him twice or three times, remind me that morning before we  
4 call the jury and we'll arraign him and get it over with.

5 MR. MARTIN: Thank you.

6 MR. KAPLOVITZ: No, your Honor.

7 (Proceedings concluded.)

8 -- -- --

9 CERTIFICATE

10

11 I, JOAN L. MORGAN, Official Court Reporter for the  
12 United States District Court for the Eastern District of  
13 Michigan, appointed pursuant to the provisions of Title 28,  
14 United States Code, Section 753, do hereby certify that the  
15 foregoing proceedings were had in the within entitled and  
16 number cause of the date hereinbefore set forth, and I do  
17 hereby certify that the foregoing transcript has been  
18 prepared by me or under my direction.

19

20 S:/ JOAN L. MORGAN, CSR

21 Official Court Reporter

22 Detroit, Michigan 48226

23

24

25 January 7<sup>th</sup>, 2015